Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

KENNETH HARPER, DANIEL GOMEZ, ABRAHAM DEL CARMEN and BRIAN RUSSELL,

Petitioners,

vs.

BLOCKBUSTER ENTERTAINMENT CORP., a Delaware Corporation merged into Viacom, Inc.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the "but-for" test applied to cases of employment discrimination in an employer's health and pension benefits programs also apply to other terms and conditions of employment, such as requiring men but not women to wear their hair short?

2. Is the "but-for" test applicable in cases of employment discrimination only where the discrimination is based upon sex alone, but not where the discrimination is based on sex plus a "mutable characteristic" such as hair length?

3. May an employer retaliate against employees for protesting a discriminatory employment policy where that policy had been approved by decisions of the courts when employees seek in good faith to overturn those decisions based on subsequent decisions of the United States Supreme Court?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgement is sought to be reviewed here appear in the caption of the case. There are no parent companies or wholly owned subsidiary companies to be listed.

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PETITION FOR WRIT OF CERTIORARI

Kenneth Harper, Daniel Gomez, Abraham Del Carmen, and Brian Russell respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on April 29, 1998, in order to resolve important issues of federal law decided in a way that appears to conflict with relevant decisions of this Court, and which in other respects involve a question of federal law which has not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is reported at 139 F.3d 1385, and is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinion and order of the district court in this case is reproduced at 11a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII") are set forth below:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-3. **Other unlawful employment practices**

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-

> job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

STATEMENT OF THE CASE

All four of the petitioners, as well as other employees, were terminated from their employment with Blockbuster Entertainment Corp. (hereinafter *"Blockbuster"*). In May, 1994, *Blockbuster* announced a new work rule which required all male employees to wear their hair neatly trimmed, not to extend past their collar, as of June 1, 1994.

At that time, Abraham Del Carmen, who began working for *Blockbuster* in 1989, had been employed for nearly 5 years. Daniel Gomez and Brian Russell had been working there since 1993. Each of the three gentlemen chose to wear their hair long, and did so prior to being hired, and continuously until they were fired in the summer of 1994. Ken Harper was hired in August, 1993, and was specifically assured when he was hired that there was no policy against wearing his hair long. In reliance upon this assurance, he began to allow his hair to grow to shoulder length.

The new rule applied to men only, and non-complying employees were to be terminated. The petitioners declined to cut their hair, and also protested this new rule as discriminatory. Specifically, Dan Gomez and Brian Russell were the subject of stories in the *Miami Herald* and local news organizations concerning their protest of this new work rule. On June 1, 1994, all four men were terminated because they refused to cut their hair, and, at least with respect to Brian Russell and Dan Gomez, because they had protested this new work rule through the news media.

The male hair length policy initiated by *Blockbuster* is not justified by a bona fide business necessity and is not a "Bona Fide Occupational Qualification" (BFOQ).

The four former *Blockbuster* employees filed timely charges of discrimination under both state and federal law. The EEOC ultimately ruled in their favor, finding that there was probable cause to believe that *Blockbuster* had violated Title VII. Petitioners filed a four count complaint alleging violations of Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e, as amended by the Civil Rights Act of 1991, pursuant to 42 U.S.C. § 1981a, and also state law. The complaint alleged sex discrimination because the hair length policy applies to men and not to women, and retaliation under 42 U.S.C. § 2000e-3. Subject matter jurisdiction was proper under 28 U.S.C. §§ 1331 and 1337. The district court dismissed the case in its entirety.

On appeal to Eleventh Circuit Court of Appeals affirmed. The court adhered to the precedent established by its predecessor court in *Willingham v. Macon Telegraph*

Pub. Co., 507 F.2d 1084 (5th Cir. 1975) (en banc). 139 F.3d 1387, App. at 3a. In rejecting the retaliation claims, the court found fault with petitioners' argument that they had a reasonable basis to believe that the reasoning of *Willingham* was no longer valid in light of subsequent decisions of this Court. 139 F.3d 1388, App. at 6a. In reaching this conclusion, the court distinguished three decisions of the Court: *UAW v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) and *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). 139 F.3d 1388-1389, App. at 6a-9a.

Johnson Controls held that a company's policy of prohibiting women capable of bearing children from working in battery manufacturing was discriminatory. The court of appeals concluded that this case was therefore consistent with *Willingham*, which the court describes as "holding that distinctions between men and women on the basis of fundamental rights such as the right to bear children constitute discrimination on the basis of sex under Title VII." 139 F.3d 1388, App. at 7a. Apparently concluding that the choice of hair style was not a fundamental right, *Johnson Controls* was distinguished.

The court then concluded that the "but-for" test set forth in *Newport News* and *Manhart* did not apply to the facts of this case and therefore does not undermine the reasoning of *Willingham*. Two reasons were given.

The first reason is that these two cases involved employee benefits that "bear directly upon employment

opportunity." 139 F.3d 1389, App. at 8a. Such an "employment opportunity" is different from the work rule here at issue, that, in the view of the court of appeals, relate " 'more closely to the employer's choice of how to run his business than to equality of employment opportunity.' " *Id.*

The second reason given as to why *Newport News* and *Manhart* do not apply to this case is because the "but-for" test of these cases "is appropriate only where alleged discrimination is based on sex alone." *Id.* The court of appeals says the "but-for" test is inapplicable in cases where a company's employment policy is aimed at sex plus a neutral, mutable, characteristic – in this instance hair length. 139 F.3d 1389, App. at 9a.

Based on this analysis, the court of appeals held that these decisions have not "supplanted the reasoning or called into question the conclusions set forth" in *Willingham*, and that the petitioners therefore had no objectively reasonable belief that the hair length policy directed at men discriminated against them on account of their sex. *Id.* Consequently, terminating them for protesting this policy was not actionable retaliation.

REASONS FOR GRANTING THE WRIT

The Court should grant review in this case because the court of appeals has interpreted employment discrimination law in a way that appears to be contrary to the decisions of this Court distinguished in the lower court opinion.

The court of appeals continues to adhere to the decision in the *Willingham* case decided 23 years ago. In the years that have passed since *Willingham* was decided, employment discrimination law has evolved far beyond the reasoning provided in that case and does not support the conclusion reached in that case. In *International Union, UAW v. Johnson Controls*, 111 S.Ct. 1196, 499 U.S. 187, 113 L.Ed.2d 158 (1991), this Court held that an explicitly discriminatory policy, such as that employed here by *Blockbuster*, may only be lawfully justified if the employer shows a bona fide occupational qualification within the meaning of the statute.

Johnson Controls reflects a trend in employment discrimination law that focuses on the intent of the employer, and prohibits work rules that explicitly discriminate on the basis of sex, absent a legitimate business reason for doing so. This trend is also reflected in *Newport News v. EEOC*, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) and *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978).

In finding a work rule which provided lesser pregnancy-related benefits to men than to women to be unlawful, the Court explained that "[s]uch a practice would not pass the simple test of Title VII discrimination that we enunciated in [ ] *Manhart*, for it would treat a male employee with dependents 'in a manner which but for that person's sex would be different.' " 462 U.S. 707, 98 S.Ct. 1375.

Nothing in the decisions of this Court limits the application of the "but-for" test as the court of appeals has now held.

I. THE "BUT-FOR" TEST FOR EMPLOYMENT DISCRIMINATION APPLIES TO TERMS AND CONDITIONS OF EMPLOYMENT OTHER THAN JUST EMPLOYER HEALTH AND PENSION BENEFITS

This Court in *Johnson Controls* held that facially discriminatory employment policies are unlawful under Title VII as applied to the terms and conditions of employment, as well as hiring and discharging decisions, and other decisions that affect an employee's status. 111 S.Ct. 1202. Nothing in this opinion limits its applicability to the exercise of "fundamental rights," as the court of appeals concluded. The Court looked to explicit terms of the policy in issue there and, relying on the "but-for" test articulated in *Manhart*, found that employment policy – which did not involve health or pension benefits – unlawful under Title VII.

Nothing in *Johnson Controls*, *Manhart*, or *Newport News* limits their applicability to "employment opportunities" as opposed to other terms and conditions of employment. Indeed, *Manhart* specifically explains that in passing Title VII Congress intended to strike at the entire spectrum of sexual "stereotypes." 98 S.Ct. 1375, n. 13. Stereotyped concepts of the appearance of men as well as of women are covered by the statute. Employers who seek to impose such stereotypes on men by forcing them to conform to a stereotypical view that all men wear short

hair impose a term and condition of employment that is explicitly based on sex and is unlawful under Title VII.

II. THE "BUT-FOR" TEST FOR EMPLOYMENT DISCRIMINATION APPLIES EVEN IF THE DISCRIMINATION IS BASED ON SEX PLUS A "MUTABLE CHARACTERISTIC"

There is also nothing in the *Johnson Controls, Manhart,* or *Newport News* line of cases that limits the straightforward "but-for" test to instances of employment policies that discriminate on the basis of sex alone, as opposed to "sex plus" a neutral, "mutable" characteristic. In continuing to adhere to the old Fifth Circuit reasoning in *Willingham* that espouses this more limited construction on Title VII, the court of appeals has interjected outdated concepts of Title VII jurisprudence that returns confusions into an area of law clarified by the simple "but-for" test subsequently adopted by this Court. The holding that an employer may discriminate based on sex so long as the discrimination involves a "mutable characteristic" or some right that is not "fundamental" derives from a view of the law in *Willingham* that is contrary to subsequent decisions of this Court.

The court in *Willingham* questioned whether the view of Justice Marshall, that sexual stereotypes such as the one in question here violate Title VII, was shared by any other member of the Court. 507 F.2d 1089, citing, *Phillips v. Martin Marietta,* 400 U.S. 542, 545, 91 S.Ct. 496, 498, 27 L.Ed.2d 613 (1971) (Marshall, J. concurring). In rejecting the notion that employment policies that effect other than

employment "opportunities," or that imposed sexual stereotypes violate Title VII, the court concluded that Justice Marshall's contrary views "appear to be his own." 507 F.2d 1092. This conclusion was based on the fact that he separately concurred in *Martin Marietta* without being joined by any other justice as "a fair indication that he speaks there only for himself." *Id.*

The decision in *Manhart*, as noted *supra*, and later in *Newport News* and *Johnson Controls* seem to be a fair indication that, regardless of the collective views of members of the Court at the time *Martin Marietta* was decided, the *Willingham* approach resuscitated by the court of appeals is contrary to these decisions of the Court.

III. AN EMPLOYER MAY NOT RETALIATE AGAINST EMPLOYEES WHO PROTEST A PREVIOUSLY UPHELD WORK RULE AS DISCRIMINATORY IF THEY ADVOCATE IN GOOD FAITH THAT DECISIONS APPROVING THE WORK RULE WILL BE OVERTURNED

After attempting to distinguish *Manhart*, *Newport News*, and *Johnson Controls*, the court of appeals found that petitioners' belief that *Willingham* was no longer valid based on these decisions was not objectively reasonable. 139 F.3d 1388, 1389, App. at 6a, 9a. The court reasoned that since their protest of the hair length work rule was not based on an objectively reasonable belief that the rule discriminated against them on the basis of their sex, the employer could lawfully retaliate against them for this protest.

This conclusion is based on an interpretation of Title VII that has yet to be ruled upon by this Court. The court of appeals has set forth a standard for judging retaliation claims that has not heretofore been established by the Court. The standard adopted below permits an employer to punish employees who believe, along with the EEOC, that a work rule is discriminatory, and seek in good faith to change contrary decisions by the courts. Such an interpretation would frustrate the purposes of the anti-retaliation provisions of Title VII, and presents an important issue of federal law that this Court has not yet addressed, but one which should be resolved.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Kenneth HARPER, Daniel Gomez, Abraham Del Carmen, Brian Russell, Plaintiffs-Appellants,

v.

BLOCKBUSTER ENTERTAINMENT CORPORATION, a Delaware corporation merged into Viacom, Inc., Defendant-Appellee.

No. 97-4364.

United States Court of Appeals,
Eleventh Circuit.

April 29, 1998.

Appeal from the United States District Court for the Southern District of Florida.

Before COX and CARNES, Circuit Judges, and MARCUS*, District Judge.

CARNES, Circuit Judge:

The plaintiffs in this case are four males formerly employed by Blockbuster Entertainment Corp. ("Blockbuster"). They brought this suit against Blockbuster under Title VII and the Florida Civil Rights Act alleging that Blockbuster's grooming policy discriminated against them on the basis of their sex and that they were wrongfully terminated in retaliation for protesting that policy.

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* Honorable Stanley Marcus was a U.S. District Judge for the Southern District of Florida sitting by designation as a member of this panel when this appeal was argued and taken under submission. On November 24, 1997, he took the oath of office as a United States Circuit Judge of the Eleventh Circuit.

After the district court granted Blockbuster's motion to dismiss the plaintiffs' complaint, the plaintiffs appealed. For the reasons discussed below, we affirm the district court's order dismissing plaintiffs' complaint.

I. FACTS AND PROCEDURAL HISTORY

For purposes of this appeal, we accept the allegations in plaintiffs' complaint as true. *See Harper v. Thomas*, 988 F.2d 101, 103 (11th Cir.1993).

In May of 1994, Blockbuster implemented a new grooming policy that prohibited men, but not women, from wearing long hair. The plaintiffs, all men with long hair, refused to comply with the policy. They protested the policy as discriminatory and communicated their protest to supervisory officials of Blockbuster. Two of the plaintiffs were the subject of media stories concerning their protest of the policy. All of the plaintiffs were subsequently terminated by Blockbuster because they had refused to cut their hair and because they had protested the grooming policy.

The plaintiffs timely filed a charge with the Equal Employment Opportunity Commission ("EEOC"). After the EEOC issued right to sue letters, the plaintiffs filed a four-count complaint alleging: (1) sex discrimination under Title VII, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"); (2) sex discrimination under the Florida Civil Rights Act of 1992, Fla. Stat. §§ 760.01 *et seq.* ("Florida Civil Rights Act"); (3) unlawful retaliation under Title VII; and (4) unlawful retaliation under the Florida Civil Rights Act.

Blockbuster moved to dismiss the complaint pursuant to F.R.C.P. 12(b)(6). The district court granted the motion, and this appeal followed.

II. STANDARD OF REVIEW

We review *de novo* a dismissal for failure to state a claim. "The standard of review for a motion to dismiss is the same for the appellate court as it was for the trial court." *Stephens v. H.H.S.*, 901 F.2d 1571, 1573 (11th Cir.1990). A motion to dismiss is only granted when the movant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

III. DISCUSSION

A. COUNT I: THE TITLE VII SEX DISCRIMINATION CLAIM

The plaintiffs allege that Blockbuster's grooming policy discriminates on the basis of sex in violation of Title VII. In *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir.1975) (en banc), our predecessor Court held that differing hair length standards for men and women do not violate Title VII, a holding which squarely forecloses the plaintiffs' discrimination claim. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209-10 (11th Cir.1981). Accordingly, the district court correctly dismissed Count I.

B. COUNT II: THE FLORIDA CIVIL RIGHTS ACT SEX DISCRIMINATION CLAIM

The plaintiffs also allege that Blockbuster's grooming policy discriminates on the basis of sex in violation of the Florida Civil Rights Act.

The Florida courts have held that decisions construing Title VII are applicable when considering claims under the Florida Civil Rights Act, because the Florida act was patterned after Title VII. *See Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So.2d 1005, 1009 (Fla.1989); *Florida State Univ. v. Sondel*, 685 So.2d 923, 925 n. 1 (Fla.Dist.Ct.App.1996); *Gray v. Russell Corp.*, 681 So.2d 310, 312 (Fla.Dist.Ct.App.1996); *see also Paris v. City of Coral Gables*, 951 F.Supp. 1584, 1585 (S.D.Fla.1995); *Kelly v. K.D. Construction of Fla., Inc.*, 866 F.Supp. 1406, 1411 (S.D.Fla.1994). No Florida court has interpreted the Florida statute to impose substantive liability where Title VII does not.[1] Therefore, for the same reasons the complaint fails to state a sex discrimination claim under Title VII, it fails to state a sex discrimination claim under the Florida Civil Rights Act. The district court correctly dismissed Count II.

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[1] Plaintiffs cite *Andujar v. National Property & Casualty Underwriters*, 659 So.2d 1214 (Fla.Dist.Ct.App.1995), to suggest that the Florida Civil Rights Act may have different substantive standards than Title VII. Noting that Title VII and the Florida Civil Rights Act are product of different sovereigns, the *Andujar* Court held that a judgment under Title VII does not preclude, under the doctrine of *res judicata*, a later judgment under the Florida Civil Rights Act. *See id.* at 1216-17. However, the court did not hold that the two statutes have different substantive standards for imposing liability.

C. COUNT III: THE TITLE VII RETALIATION CLAIM

The plaintiffs allege that they were discharged by Blockbuster in retaliation for protesting Blockbuster's grooming policy. To establish a prima facie case of retaliation under Title VII, a plaintiff must demonstrate: (1) that he engaged in statutorily protected activity; (2) that he suffered adverse employment action; and (3) that the adverse employment action was causally related to the protected activity. *See, e.g., Coutu v. Martin County Bd. of County Comm'rs,* 47 F.3d 1068, 1074 (11th Cir.1995). A plaintiff engages in "statutorily protected activity" when he or she protests an employer's conduct which is actually lawful, so long as he or she demonstrates "a good faith, reasonable belief that the employer was engaged in unlawful employment practices." *Little v. United Technologies, Carrier Transicold Division,* 103 F.3d 956, 960 (11th Cir.1997). However, it is insufficient for a plaintiff "to allege his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable." *Id.*

The reasonableness of the plaintiffs' belief in this case is belied by the unanimity with which the courts have declared grooming policies like Blockbuster's non-discriminatory. Every circuit to have considered the issue has reached the same conclusion reached by this Court in the *Willingham* decision. *See Longo v. Carlisle DeCoppet & Co.,* 537 F.2d 685, 685 (2d Cir.1976); *Earwood v. Continental Southeastern Lines, Inc.,* 539 F.2d 1349, 1351 (4th Cir.1976); *Barker v. Taft Broadcasting Co.,* 549 F.2d 400, 401 (6th

Cir.1977); *Knott v. Missouri Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir.1975); *Baker v. California Land Title Co.*, 507 F.2d 895, 898 (9th Cir.1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336 (D.C.Cir.1973).[2] The EEOC initially took a contrary position, but in the face of the unanimous position of the courts of appeal that have addressed the issue, it finally "concluded that successful litigation of male hair length cases would be virtually impossible." *EEOC Compliance Manual*, § 619.1 (Bureau of Nat'l Affairs, Inc.1996). Accordingly, the EEOC ran up a white flag on the issue, advising its field offices to administratively close all sex discrimination charges dealing with male hair length. *See id.*

Nonetheless, the plaintiffs contend that three decisions of the United States Supreme Court, decided after *Willingham*, made it reasonable to believe that Blockbuster's grooming policy violates the mandate of Title VII. However, as we will discuss below, none of the cases cited by the plaintiffs call into question the continuing validity of *Willingham;* therefore, the plaintiffs' belief that Blockbuster's grooming policy violated Title VII's prohibition against sex discrimination was not reasonable.

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[2] The plaintiffs also argue that when judging the reasonableness of their belief, we should not charge them with substantive knowledge of the law as set forth in *Willingham* and the cases cited above. We reject the plaintiffs' argument because it would eviscerate the objective component of our reasonableness inquiry. *See Little*, 103 F.3d at 960. If the plaintiffs are free to disclaim knowledge of the substantive law, the reasonableness inquiry becomes no more than speculation regarding their subjective knowledge.

The plaintiffs first point us to *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991). In *Johnson Controls*, the Court held that a company's policy of prohibiting women capable of bearing children from working in battery manufacturing jobs was facially discriminatory.[3] *Id.* at 198, 111 S.Ct at 1203. That holding, however, is entirely consistent with the *Willingham* Court's holding, and thus, fails to advance plaintiffs' argument. *See Willingham*, 507 F.2d at 1091-92 (holding that distinctions between men and women on the basis of fundamental rights such as the right to bear children constitute discrimination on the basis of sex under Title VII).

The plaintiffs also rely on *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983), and *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), to support their position. In *Manhart*, the Court held that a policy requiring female employees to make larger contributions to an employee pension fund than their male counterparts was discriminatory. *See Manhart*, 435 U.S. at 711, 98 S.Ct. at 1377. The Court stated: "Such a practice does not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." *Id.* (internal quotation omitted). In *Newport News*,

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[3] The Court went on to hold that the company's policy did not constitute a bona fide occupational qualification ("BFOQ"). *See Johnson Controls*, 499 U.S. at 204, 111 S.Ct. at 1206. However, that portion of the court's decision is not relevant here, because we are not faced with the question of whether Blockbuster's grooming policy constituted a BFOQ.

the Court applied the test from *Manhart* to an employer's policy of providing lesser health benefits to the spouses of male employees than to the spouses of female employees, and concluded that the policy was discriminatory. *See Newport News,* 462 U.S. at 683, 103 S.Ct. at 2631. The plaintiffs argue that the application of the "but-for" test in *Manhart* and *Newport News,* undermines the *Willingham* Court's analysis and conclusions. We disagree for two reasons.

First, the policies at issue in *Newport News* and *Manhart* related to employee health and pension benefits. The existence and extent of such benefits bear directly on employment opportunity. Because health and pension benefits frequently represent a crucial component of an employee's compensation, the practical effect of denying or reducing such benefits on the basis of sex is to deny the employee an "employment opportunity" on the basis of sex. In contrast, the grooming policy at issue in *Willingham* "related more closely to the employer's choice of how to run his business than to equality of employment opportunity." 507 F.2d at 1091. Reasoning that Title VII was intended to "guarantee equal job opportunity for males and females," we concluded in *Willingham* that the grooming policy did not constitute sex discrimination. *Id.* Therefore, the Supreme Court's holdings in both *Newport News* and *Manhart* are consistent with the reasoning and conclusions of the *Willingham* Court. *See Tavora v. New York Mercantile Exchange,* 101 F.3d 907, 908 (2d Cir.1996).

Second, the discrimination at issue in *Newport News* and *Manhart* was discrimination based on sex alone. The *Newport News* and *Manhart* plaintiffs could not avoid the effects of the discriminatory policies; they received lesser

benefits simply because of their sex. Because the discriminatory policies in those cases were aimed at a single immutable characteristic – the plaintiffs' sex – a simple "but for" test effectively identified forbidden discrimination. In contrast, the alleged discrimination at issue in *Willingham* was between members of the same sex based on the neutral characteristic of hair length. The *Willingham* plaintiff was denied employment because he chose not to cut his hair; however, males in general were not prohibited from working for the defendant. Consequently, applying the "but-for" test from *Newport News* and *Manhart* to a *Willingham*-type situation does not effectively identify forbidden discrimination, i.e., discrimination that deprives members of a given sex of equal employment opportunity. The "but-for" test is appropriate only where alleged discrimination is based on sex alone. Therefore, the Supreme Court's use of that test in *Newport News* and *Manhart* does not affect the analysis or conclusions of the *Willingham* Court.

The plaintiffs chose to protest Blockbuster's grooming policy despite the existence of long-standing binding precedent holding that such a policy was not discriminatory. No decision cited by the plaintiffs has supplanted the reasoning or called into question the conclusions set forth in that binding precedent. Therefore, we hold that the plaintiffs could not have had an objectively reasonable belief that Blockbuster's grooming policy discriminated against them on the basis of their sex. Accordingly, the district court correctly dismissed the plaintiffs' Title VII retaliation claim.

D. COUNT IV: THE FLORIDA CIVIL RIGHTS ACT RETALIATION CLAIM

The plaintiffs allege that Blockbuster violated the Florida Civil Rights Act by retaliating against them for protesting its grooming policy. As discussed above, decisions construing Title VII guide the analysis of claims under the Florida Civil Rights Act. Accordingly, because the plaintiffs cannot maintain a retaliation claim under Title VII, we conclude that the district court correctly dismissed the plaintiffs' Florida Civil Rights Act retaliation claim.

IV. CONCLUSION

For the reasons set forth above, we AFFIRM the district court's order dismissing the plaintiffs' complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-2461-CIV-GRAHAM

KENNETH HARPER, et al.,

Plaintiff(s),

vs.

BLOCKBUSTER ENTERTAINMENT CORP.,

Defendant(s).

_____/

ORDER OF DISMISSAL

(Filed Jan. 24, 1997)

THIS CAUSE came before the Court upon Defendants' Motion to Dismiss Plaintiffs' Complaint (DE 6).

Plaintiffs in this action are four (4) male employees (hereinafter collectively referred to as "plaintiffs") of Blockbuster Entertainment Corp. a/k/a Blockbuster Music Retail, Inc. and Blockbuster Videos, Inc. ("Blockbuster").

The plaintiffs in this action protest a grooming policy which prohibits men, but not women, from wearing long hair. Blockbuster's grooming policy became effective June 1, 1994. The plaintiffs all had long hair and refused to comply with Blockbuster's grooming policy. They were terminated from employment at Blockbuster for violating the grooming policy.

Plaintiffs timely filed a charge with the Equal Employment Opportunity Commission ("EEOC"). The EEOC determined that the policy was discriminatory and issued plaintiffs right to sue letters. Plaintiffs initiated this action for *(1)* violations of Title VII, 42 U.S.C. §§ 2000e, *et. seq.* ("Title VII"); *(2)* violations of the Florida

Human Rights Act of 1992, Fla. Stat. §§ 760.01, *et. seq.* ("Florida Human Rights Act"); (3) Retaliation under Title VII; (4) Retaliation under the Florida Human Rights Act.

A motion to dismiss is appropriate when it is demonstrated "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957).

Differing hair-length standards for men and women do not violate Title VII. *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907, 908 (2nd Cir. 1996) and cases cited therein.[1] Federal decisions construing Title VII

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[1] Plaintiffs cite to the EEOC Compliance Manual § 619 in support of their position. However, the Compliance Manual recognizes that the EEOC's position regarding such grooming standards are at odds with the law as established by several United States Circuit Courts of Appeals. The Manual states in pertinent part:

> The vast majority of cases treating employer grooming codes as an issue have involved appearance requirements for men. Initially, the federal district courts were split on the issue; however, the circuit courts of appeals have unanimously concluded that different appearance standards for male and female employees, particularly those involving hair length where women are allowed to wear long hair but men are not, do not constitute sex discrimination under Title VII. In contrast to the circuit court cases, decisions rendered by EEOC have consistently concluded that, absent a showing of a business necessity, different grooming standards for men and women constitute sex discrimination under Title VII.

are to be followed when considering Florida's Civil Rights Act because the Florida Act was patterned after Title VII. *Florida Dep't. of Community Affairs v. Bryant*, 586 So.2d 1205, 1209 (Fla. 1st DCA 1991); *Kelly v. K.D. Construction of Florida, Inc.*, 866 F.Supp. 1406, 1411 (S.D. Fla. 1994). Therefore Counts I and II of the Complaint are hereby DISMISSED.

In addition, plaintiffs have alleged retaliation claims under Title VII and the Florida Human Rights Act.

A claim for retaliation is separate and distinct from the underlying discrimination claim. *Meeks v. Computer Associates International*, 15 F.3d 1013, 1021 (11th Cir. 1994) (Title VII); *Hargett v. Valley Federal Savings Bank*, 60 F.3d 754, 765 (11th Cir. 1995) (age discrimination). Thus, a plaintiff may be successful on a retaliation claim, even though he is not successful on his underlying Title VII claim.

In order to establish a *prima facie* case for retaliation a plaintiff must show: "(1) that he has engaged in statutorily protected activity; (2) that the employer has taken an adverse employment action; and (3) a causal connection exists between the two." *EEOC v. Reichhold Chemicals,*

The weight of existing judicial authority and the Commission's contrary interpretation of the statute could not be reconciled. Thus, the Commission, while maintaining its position with respect to the issue, concluded that successful conciliation and successful litigation of male hair length cases would be virtually impossible. Accordingly, field offices were advised to administratively close all sex discrimination charges which dealt with male hair length and to issue right to sue notices in each of those cases.

988 F.2d 1564, 1571 (11th Cir. 1993) (Title VII), *reh'g. den.*, 996 F.2d 316 (11th Cir. 1993); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600-601 (11th Cir. 1986), *reh'g. denied*, 800 F.2d 267 (11th Cir. 1986), *citing to, Canino v. United States Equal Employment Opportunity Commission*, 707 F.2d 468, 471 (11th Cir. 1983).

Although the plaintiff need not prevail on his underlying Title VII claim, he must have a "reasonable good faith belief" that the employment practice opposed was unlawful. *Meeks*, 15 F.3d at 1021.

The Florida Human Rights Act is to be construed in accordance with Title VII. *Florida Dep't. of Community Affairs*, 586 So.2d at 1209; *Kelly*, 866 F.Supp. at 1411.

Based on the settled precedent in this Circuit, plaintiffs could not have had a reasonable good faith belief that Blockbuster's grooming policy was unlawful. Therefore, plaintiffs have failed to establish a *prima facie* case of retaliation under Title VII of the Florida Human Rights Act. Therefore, Counts III and IV of the Complaint must be dismissed. Accordingly, it is

ORDERED AND ADJUDGED that the Motion is GRANTED. The Complaint in this matter is DISMISSED IN ITS ENTIRETY.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of January, 1997.

/s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

Supreme Court, U.S.
FILED
OCT 16 1998
OFFICE OF THE CLERK

No. 98-200

In The

Supreme Court of the United States

October Term, 1998

KENNETH HARPER, DANIEL GOMEZ, ABRAHAM DEL CARMEN and BRIAN RUSSELL,

Petitioners,

vs.

BLOCKBUSTER ENTERTAINMENT CORP., a Delaware Corporation merged into Viacom, Inc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a private employer violates section 2000e-2 of Title VII by adopting and enforcing dress and grooming standards that among other things, require men, but not women, to keep their hair no longer than "two inches below the top of the collar."

2. Whether an employee discharged for violating a dress and grooming standard regulating hair length, states a claim for retaliation under section 2000e-3 of Title VII when the employee could not have had an objectively reasonable belief that the standard was an unlawful employment practice.

STATEMENT PURSUANT TO RULE 29.6

In the plaintiffs' complaint, they erroneously named "Blockbuster Entertainment Corporation" as the defendant. Blockbuster Entertainment Corporation no longer exists; the company was merged into Viacom Inc. on September 24, 1994. Nevertheless, Blockbuster has chosen not to contest this misnomer.

The true respondents in this case, Blockbuster Music Retail, Inc. and Blockbuster Videos, Inc., are wholly-owned subsidiaries of Viacom Inc. Neither of the respondents have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

The petitioners' brief contains several mischaracterizations of the factual and procedural background of the case. First, there is no evidence in the record below that employees other than the petitioners were terminated from their employment for non-compliance with the hair-length policy.

Second, the petitioners imply that only male employees were subject to grooming policies. In fact, there was a single "dress and grooming standard[]" for *all* employees, which in some instances announced different standards for men and women. For example, all employees had to wear "clean and unwrinkled khaki slacks"; women, but not men, were allowed to substitute khaki skirts. The grooming policy regulated the grooming and appearance of both sexes' hair, although the policy did not specifically address hair length for females.

Third, the petitioners' assertion that the male-hair-length policy is not a bona fide occupational qualification is gratuitous. As the court of appeals noted in their decision, this issue was never reached by the courts. Petition at 7a n.3.

Fourth, contrary to the petitioners characterization of the EEOC's involvement in this case, the EEOC did not "rule[] in their favor, [and] find[] that there was probable cause to believe Blockbuster had violated Title VII." Instead, as recognized by the court of appeals, the EEOC "concluded that successful litigation of male hair length cases would be virtually impossible." Petition at 6a (quoting the EEOC Compliance Manual). Accordingly, the EEOC ordered that all cases be closed and that right-to-sue letters be granted automatically. *Id.*

Fifth, the petitioners' summary discussion of the court of appeals decision does not completely reflect the court's decision. Because the decision is attached to the petition, however, a more detailed exposition will not be made here.

REASONS FOR DENYING THE WRIT

The Court should deny the petition because the court of appeals correctly applied the law governing claims of employment discrimination based on grooming policies, the circuit courts are undivided in their application of the law in this area, and the unanimous circuit court rulings are not at odds with the rulings of this Court. Further, because there is no objectively reasonable basis to believe the grooming policy in question is unlawful, the petitioners' claim of retaliation is meritless.

The law governing grooming policies in the Eleventh Circuit is well settled, "differing hair length standards for men and women do not violate Title VII." *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (citing *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (*en banc*); *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209-10 (11th Cir. 1981) (adopting the rulings of its predecessor court)). Every circuit that has considered this issue has reached the same conclusion. *Tavora v. New York Mercantile Exchange*, 101 F.3d 907, 908 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1821, 137 L. Ed. 2d 1029 (1997); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975) (*en banc*); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Knott v. Missouri Pac. R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Baker v. California Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336 (D.C. Cir. 1973).

Notwithstanding these unanimous decisions, the petitioners argue that the reasoning in these cases is inconsistent with

current employment discrimination law as decided by this Court. Petition at 7. In support of this argument, the petitioners rely on three Supreme Court cases, *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S. Ct. 1196, 499 U.S. 187, 113 L. Ed. 2d 158 (1991); *Newport News Shipbuilding and Dry Docks Co. v. EEOC*, 462 U.S. 669, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983); and *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978); and argue that these cases adopt a simple "but for" test to determine whether there is discrimination under Title VII, 42 U.S.C. §§ 2000e, *et seq.*, ("Title VII") — i.e., whether but for the petitioners' sex they would have been treated differently by Blockbuster. And further that this test applies even when the alleged discrimination is based on sex plus a "mutable characteristic." Petition at 7-9.

The petitioners' argument that the law applied by the federal courts of appeals is inconsistent with more recent decisions of this Court, however, is incorrect. Not only are the Supreme Court cases cited by the petitioners factually distinguishable, but this Court implicitly rejected the petitioners' characterization of the law as recently as the 1997 term. For the reasons discussed below, the Court should again deny certiorari on the issues presently before the Court.

I.

THE LAW APPLIED BY THE CIRCUITS IS WELL REASONED

The petitioners seek to prohibit an employer from enforcing uniform and reasonable grooming standards for its employees on the grounds that Title VII prohibits all employment practices, including those associated with hair length, that are different for males and females. The drafters of Title VII did not intend,

however, to require identical grooming codes for men and women as part of the statutory goal of providing equal employment opportunities to both sexes. *See Willingham*, 507 F.2d at 1091 (recognizing that "grooming codes or length of hair is related more closely to the employer's choice of how to run a business than to equality of employment opportunity"). Instead, the drafters intended to provide "equal job opportunity" to the sexes. *Id.*

The federal courts of appeals have unanimously reached this same conclusion as to the drafters' intent. Some of the courts have reasoned that grooming policies are too insignificant to come under the ambit of Title VII. Others have found such policies lawful because they are directed at mutable, rather than biological, differences between the sexes. Further along these lines, some courts have reasoned that when, as here, the policies are not unreasonable and can be so easily complied with, it would frustrate common sense to outlaw such policies. All of these decisions are well reasoned and reach the same conclusion — Title VII was never intended to foreclose grooming policies. Any other interpretation of the statute would lead to absurd results.

For example, if a "but for" test was applied to *every* sex-plus-a-mutable-characteristic claim of discrimination, a private employer would be powerless to adopt and enforce any grooming and dress standards or practices that are customarily recognized by the sexes. *See Willingham v. Macon Telegraph Pub. Co.*, 352 F. Supp. 1018, 1020 (M.D. Ga. 1972), *aff'd*, 507 F.2d 1084 (5th Cir. 1975) (*en banc*). Yet, the petitioners assert that such an interpretation of Title VII is embodied in the three Supreme Court decisions discussed below.

II.

THIS COURT'S DECISIONS ARE FACTUALLY DISTINGUISHABLE

In *Johnson Controls* the employer adopted a policy that prohibited female employees capable of bearing children from working in jobs involving a high risk of lead exposure. This Court found that the policy constituted sex discrimination and that the employer's concern for the safety risk posed to unborn children did not constitute a bona fide occupational qualification sufficient to deny employment opportunities to women.

Unlike the hair-grooming policy involved in the petition before the Court, *Johnson Controls* involved discrimination based on the fundamental right to have children. *Johnson Controls*, 499 U.S. at 199 (recognizing that "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex" (citations omitted)). As the *Willingham* court recognized,

> a line must be drawn between distinctions grounded on such fundamental rights as the right to have children or to marry and those interfering with the manner in which an employer . . . operate[s] a business.

507 F.2d at 1091. Nothing in *Johnson Controls* undermines the distinction made in *Willingham*.

In both *Newport News* and *Manhart*, the Court found discriminatory a company policy that provided significantly different pension and health benefits for male and female employees. As recognized by the court of appeals below, such benefits often represent a crucial component of an employer's

compensation. 139 F.3d at 1389. Thus, "the *practical effect* of denying or reducing such benefits on the basis of sex is to deny the employee an 'employment opportunity' on the basis of sex." *Id.* (emphasis added). In contrast, a hair-length policy has only a *de minimis effect* on employment opportunities because hair length is an easily altered or mutable characteristic. *See Tavora*, 101 F.3d at 908 (recognizing the trivial nature of a hair-length policy in contrast to pension and health policies); *Willingham*, 507 F.2d at 1091 ("Hair length is not immutable and . . . enjoys no constitutional protection."); *Dodge*, 488 F.2d at 1337 ("Title VII was never intended to encompass sexual classifications having only an insignificant effect on employment opportunities."). Again, the Court's opinions in *Newport News* and *Manhart* do not explicitly or implicitly alter the distinction drawn by the federal courts of appeal.

III.

THE RULE OF LAW APPLIED BY THE FEDERAL COURTS OF APPEALS IS NOT OUTDATED

Notwithstanding the petitioners' assertion that the decisions of the federal courts of appeals are outdated for drawing distinction between *de minimis* grooming policies on the one hand, and fundamental rights and effective denials of employment opportunities on the other, at least one circuit has revisited this very same issue since the Court's decisions in *Johnson Controls*, *Newport News* and *Manhart*.

In *Tavora* a male employee was terminated for violating a hair-length policy. As here, the employee filed a Title VII action and argued that the "but for" test enunciated in *Newport News* and *Manhart*, combined with the Court's "broad language" directed at eliminating gender-based discrimination, overruled the federal courts of appeals cases cited above. Likewise, the

employee argued that Title VII applied to all employment policies that treated men and women differently, regardless how trivial.

The Second Circuit rejected these arguments because, as here, the arguments did not reflect the factual context of this Court's decisions, which involved "employment policies resulting in significantly different levels of pension and health benefits for males and females." 101 F.3d at 908. Not satisfied with the court of appeals' decision, Tavora petitioned this Court for certiorari reasserting these claims. This Court denied certiorari last term. 117 S. Ct. 1821, 137 L. Ed. 2d 1029 (1997). And the Court should do so again.

IV.

A SUBJECTIVE, GOOD-FAITH BELIEF THAT AN EMPLOYER'S POLICY IS UNLAWFUL IS NOT ENOUGH TO ESTABLISH A STATUTORILY PROTECTED ACTIVITY

As the court of appeals recognized below, to establish a prima facie case of retaliation under Title VII, the employee must demonstrate:

> (1) that he engaged in statutorily protected activity;
> (2) that he suffered adverse employment action; and
> (3) that the adverse employment action was causally related to the protected activity.

139 F.3d at 1388. An employee's protest of an employer's lawful conduct is statutorily protected so long as the employee can demonstrate a good faith, *objectively* reasonable belief that the employer had unlawful employment practices. *Id.* (citing *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956, 960 (11th Cir. 1997)).

Based on the unanimous decisions of the federal courts of appeals denying hair-length policy discrimination claims, and the distinguishable nature of the Supreme Court cases cited above, the court of appeals concluded that the petitioners did not have an objectively reasonable belief that the employer was engaged in unlawful employment practices. The petitioners argue that this standard is too severe. According to the petitioners an employee's protest of an employer's policies should be protected so long as the employee subjectively believes that the policy is discriminatory, "and seek[s] in good faith to change contrary decisions by the courts." Petition at 11.

The standard of review for retaliation claims offered by the petitioners represents no standard at all. An employee that disagreed with an employer's policy and long-standing judicial precedent upholding the policy, could protest publicly, disrupt the work environment, and refuse to comply with the policy without any fear of dismissal or other punishment. In contrast, the scope of statutorily protected activity established within the Eleventh Circuit affords an equitable degree of protection against retaliation. An employee need not show that the policy in fact violates the law; however, the employee must be able to demonstrate *a good-faith, objectively reasonable belief* that the policy is unlawful.

CONCLUSION

The Court should deny this petition for a writ of certiorari on both the petitioners' discrimination and retaliation claims.

The law is well settled in the circuits, and there is nothing in this Court's jurisprudence in the past 20 years that would seriously call into question the decisions of the federal circuit courts of appeals that an employer does not violate Title VII by adopting and enforcing reasonable hair- grooming standards, which include hair-length limits for men.

Further, the petitioners present no compelling argument on this record for the Court to review their claim of retaliation. Petitioners, no less than employers, must be charged with knowledge of the law, which in this case is clear beyond peradventure.

Respectfully submitted,

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